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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES FLETCHER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the prosecution wants to introduce the substance of a non-testifying witness's statement as an exception to the confrontation rule to demonstrate the course of investigation, the prosecution must ensure that the jury is provided with an instruction advising them of the limited use of such evidence.

Was defendant's right of confrontation denied when the prosecutor presented evidence to the jury that a non-testifying occurrence witness had accused a person who had the name Fletcher (defendant's name) as the assailant under the theory that this was admissible to show the course of police investigation and where no jury instruction was provided to the jury advising them of the limiting the purpose of that evidence?

2. Was defendant denied his constitutional right of effective assistance of counsel when counsel was ineffective by not requesting an instruction that limited the jury's consideration of hearsay evidence concerning the police looking for a person named Fletcher?

3. Where strangers see the assailant for seconds to a few minutes and can provide nothing other than a general description and there is no evidence against defendant other than these identifications, is an identification made 12 years

after the occurrence insufficient to sustain a conviction and is a 12 year delay in making an identification so delayed as to violate due process?

PARTIES INVOLVED

Petitioner, James Fletcher, was the defendant in the Circuit Court of Cook County, appellant in the Appellate Court of Illinois, First Judicial District, and petitioner in the Supreme Court of Illinois in a Petition for Leave to Appeal.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, appellee in the Appellate Court of Illinois, First Judicial District, and respondent in the Supreme Court of Illinois in a Petition for Leave to Appeal.

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The Order of the Appellate Court of Illinois, First Judicial District, dated March 23, 2007 is attached as Appendix A to this Petition.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, James Fletcher, (hereafter, petitioner, or defendant), prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming defendant's conviction for murder and sentence of natural life.

JUDGMENT AND OPINION BELOW

The Order of the Appellate Court of Illinois, First District dated March 23, 2007 is set out as App. A.

The Order of the Supreme Court of Illinois denying Petition for Leave to Appeal on September 26, 2007, Case No. 104798 is set out as App. B.

JURISDICTIONAL STATEMENT

Jurisdiction in the Appellate Court of Illinois, First District was based on Illinois Supreme Court Rule 603.

Jurisdiction in the Supreme Court of Illinois was based on Illinois Supreme Court Rule 603 and 615, which provides that appeals from final orders of the Appellate Court of Illinois, First District shall be taken to the Supreme Court of Illinois.

The judgment of the trial court was affirmed on March 23, 2007.

Petition for Leave to Appeal was denied on September 26, 2007.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under Rules 10(b), 12 and 13 of this Court.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution reads:

> "In all criminal prosecutions, the accused shall enjoy the right of confrontation."

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> "Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

Defendant was tried before a jury for the offense of murder. Defendant was convicted and was sentenced to natural life.

The first identification of defendant as the assailant was made 12 years after the occurrence by strangers. This was an identification at a photo spread. The first in-court identification was not made until 14 years after the occurrence. There was no evidence against defendant other than the identifications.

The State presented hearsay that a non-testifying witness accused defendant.

On December 21, 1990, at about 1325 hours, a bread delivery truck driver was robbed by two men with guns. There were two witnesses who testified, the truck driver, Mr. Cooper, and a young lady, Miss Friend, who was visiting with the truck driver.

During the robbery, Mr. Cooper fired at two robbers and they fired back. A person on the street was shot and killed. The two witnesses testified they did not know the robbers. (Vol. III, Tr. 154) The two witnesses who identified defendant never saw a photo line-up or defendant in court until 12 years after the incident. (Vol. III, Tr. 89; Vol. III, Tr. 154)

Mr. Cooper testified the person identified as defendant approached him from behind. Cooper testified:

> "Q: When you saw her, what happened?
>
> A: She [Miss Friend] told me she was at a laundromat. She asked me did I have any change. I told her wait 'til I put the trays in the truck. When I opened the door to the truck, a guy came up behind me and stuck a pistol in my back." (Vol. III, Tr. 57) (Emphasis added.)

Thereafter, Cooper only saw the assailants as they were fleeing. His only view of the assailant was when the assailant was running away and shots were being fired. (Vol. III, Tr. 62)

The first suspect who came up behind witness Cooper, who was later identified as defendant, was described by Mr. Cooper as being between 5'6" and 6' tall. Mr. Cooper testified:

> "Q: And you described the height as being between five–six and six feet for the first suspect?
>
> A: Yes." (Vol. III, Tr. 88)

Mr. Cooper testified the man's weight was about 160 pounds, 170 pounds. (Vol. III, Tr. 69) No

facial description was testified to by Mr. Cooper as to the person identified as defendant.

Mr. Cooper never testified as identification witnesses usually do that he viewed the assailant's face and that he recognized defendant because he recalls defendant's face.

Miss Friend never gave a prior description as to height or weight or facial features. (Vol. III, Tr. 130-151)

Miss Friend never testified she had a good view of the assailant's face and she never testified she identified defendant because she recalled defendant's face.

She testified she only remembered how one offender looked, i.e., the defendant. (Vol. III, Tr. 151) She did not explain why she could remember one and not the other.

There was disagreement between Cooper and Miss Friend as to the description of the hair of the offender identified as defendant. Mr. Cooper testified the assailant identified as defendant had a Jheri curl. (Vol. III, Tr. 68) Miss Friend denied she was able to see his hair. Miss Friend testified:

"Q: ... What did his hair look like?

A: He had a skullcap on, a hat. It was cold

outside.

Q: Did you, in fact, see his hair at all?

A: No." (Vol. III, Tr. 152)

Cooper asserted the person had Jheri Curl coming out from under a baseball cap. He testified:

"Q: What did his hair look like back on December 21st of 1990?

A: He had like a Jheri curl, about collar length.

Q: Where could you see that Jheri curl?

A: He had a cap on. You could see -- that's the kind of stuff you put in there with the spray and stuff.

Q: Could you see his hair like on the back?

A: On the back of the collar.

Q: You said collar length?

A: The back collar." (Vol. III, Tr. 68-69)

Where Mr. Cooper testified he could see the assailant's hair, Miss Friend, who saw the same assailant, testified she saw no hair. She testified:

"Q: Did you, in fact, see his hair at all?

A: No.

Q: Did you, in fact, tell the police that he had long hair?

A: No." (Vol. III, Tr. 152)

Mr. Cooper testified he was positive on seeing the photo display 12 years after the incident, and he was one hundred percent sure, but he wanted to see the assailant in person. (Tr. III, Tr. 93) The detective who showed him the photo disputed this. He testified:

"A: He picked out one photo and said it looks like one of the offenders that shot at him and robbed him, but [... he said ...] couldn't be positive." (Vol. III, Tr. 187)

Mr. Cooper testified he told a subsequent private investigator he was only seventy-five percent sure. Mr. Cooper testified:

"Q: You do remember discussing this case with the investigator?

A: Right.

Q: Do you recall telling the investigator at

that time that you were not sure and could not be 100 percent sure of who the suspects were in this case?

A: I told him after 14[1] years I'm like about 75 percent sure of who I thought." (Vol. III, Tr. 98-99)

Cooper initially lied to police about his possession and use of a weapon. (Vol. III, Tr. 99)

Miss Friend has two felony convictions for possession and/or possession of drugs with intent to deliver. (Vol. III, Tr. 131) She had to be taken into custody to require her to appear in court. (C. 83, 84, 85, 90, 91)

Miss Friend testified she was on the truck when Mr. Cooper gave her money (Vol. III, Tr. 135) and the men approached the truck.

"[Miss Friend] A: We was standing there talking. He gave me the money. I went to get off the truck, and two guys approached the truck." (Vol. III, Tr. 135) (Emphasis added.)

In her handwritten statement, she stated she was in the truck for "about 20 minutes." Her statement reads:

---

[1] This was 2 years after the photo identification.

"Sheene states she got into the bread truck through the passenger side door. Sheenee states that she and Edward were talking for about 20 minutes." (Supplemental Record, Tr. 27)

However, she testified she never got on the truck; she just watched what occurred from outside the truck.

"A: There are two windows and a side door. I was right there looking at everything, so when they got up on the truck, they closed the door back, so he was like back some, but I could see them, what they were doing.

Q: How could you see?

A: Because the two big windows right there. I was standing there right by Uncle Remus. I never went no further. I stood right there and watched." (Vol. III, Tr. 137)

Mr. Cooper testified she had not got on the truck when the men arrived. He testified:

"Q: When you saw her, what happened?

A: She told me she was at a laundromat. She asked me did I have any change. I told her wait 'til I put the trays in the truck. When I opened the door to the truck, a guy came up

behind me and stuck a pistol in my back." (Vol. III, Tr. 57) (Emphasis added.)

Mr. Cooper testified he knew Miss Friend because he knew her mother and father. He testified:

"Q: How did you know her?

A: I knew her mother and father.

Q: Is that Sheenee Friend?

A: Right." (Vol. III, Tr. 57)

Friend, in her grand jury statement (Supplemental Record, Tr. 34-35), stated she knew Mr. Cooper since she was 16 (for about one year) and that she knew him because she met him when he delivered bread to Jewel Grocery. (Supplemental Record, Tr. 34-35) There, she testified:

"Q: Now, Sheene, did you know a person by the name of Edward Cooper?

A: Yes, ma'am.

Q: How old were you approximately when you met Edward Cooper

A: I was 16.

Q: How did you meet Edward Cooper?

A: He used to deliver bread at Jewels, and that's how I met him, going into the store. He used to deliver bread in the store.

Q: So he drove a bread truck; is that correct?

A: Yes, ma'am.

Q: What Jewel was that?

A: Right there on Madison.

Q: So you would see him when he would make deliveries and you were shopping at the Jewel?

A: Yes, ma'am.

Q: How long did you know Mr. Cooper?

A: About a year." (Supplemental Record, Tr. 34-35)

In her grand jury statement, she never mentioned that Mr. Cooper was a friend of her mother and father. She never stated in her handwritten statement that Mr. Cooper was a friend of her mother and father. (Supplemental Record, Tr. 25-29)

Both Mr. Cooper and Miss Friend testified as if they were casual friends. Miss Friend in her statement to Officer Jerome Bogucki, Star No. 20668, stated that she DATED Cooper. (Supplemental Record, Tr. 48) The report of the police officer who interviewed her reads:

> "Knew Ed Cooper and dated." (Supplemental Record, Tr. 48)

There were different versions about money Cooper gave to Miss Friend.

According to Mr. Cooper "She [Miss Friend] told me she was at a laundromat. She asked me did I have any change." (Vol. III, Tr. 57)

In a police report prepared by Officer Michael Flemming, who Miss Friend talked to, it states that when she was talking to Cooper and advised him "she needed 3 dollars to purchase bleach." (Supplemental Record, Tr. 19)

She testified she talked to him "to get some money from him for my daughter." (Vol. III, Tr. 134) In the grand jury, she testified Mr. Cooper gave her money to buy shoes for her daughter. She did not testify he gave her money for bleach. (Supplemental Record, Tr. 37)

Facts relating to Point 1 are set out within that Point.

RAISING THE FEDERAL QUESTIONS BELOW

The assertion that defendant was denied his constitutional right of confrontation was raised by objection at trial and in the State appellate and Supreme Court proceedings.

The assertion that the identification process and the identification of defendant violated due process was raised in the trial court and in the State appellate and Supreme Court proceedings.

REASONS FOR GRANTING CERTIORARI

1.

When the prosecution wants to introduce the substance of a non-testifying witness's statement as an exception to the confrontation rule to demonstrate the course of investigation, the prosecution must ensure that the jury is provided with an instruction advising them of the limited use of such evidence.

Defendant's right of confrontation was denied when the prosecutor presented evidence to the jury that a non-testifying occurrence witness had accused a person who had the name Fletcher (defendant's name) as the assailant under the theory that this was admissible to show the course of police investigation and where no jury instruction was provided to the jury advising them of the limiting the purpose of that evidence.

In opening statement by the prosecutor, in testimony offered by the prosecutor and in final argument by the prosecutor, the jury was provided with the out-of-court statement of an eye witness who stated the robber was Fletcher. The jury was never advised by an instruction that this information could not be used as direct evidence of defendant's guilt, but was admitted for a limited purpose. These statements are testimonial statements of an out-of-court accuser. Their

admission without a limiting instruction violated defendant's right of confrontation under the Sixth Amendment. Crawford v. Washington, 541 U.S. 36, 158 L.Ed.2d 177 (2004).

The prosecutor prejudicially advised the jury in opening argument that the police had a report that the person who committed the crime had the same name as defendant. The prosecutor in reference police officers' actions stated:

> "After they reviewed those, they knew from the reports that they were looking for a man named Fletcher. What they did was gather information and try to locate anyone that fit the description with the name Fletcher....
>
> [Discussion outside presence of jury.]
>
> [After objection was overruled.]
>
> [The Prosecutor]: So when these new detectives started looking into the case in 1995, because the murder had never been solved, they reviewed the entire case file. They were then looking for a man named Fletcher.
>
> * * *
>
> After re-interviewing the witnesses again, they continued to look for a suspect named Fletcher. Only this time, they were looking for

a suspect named James Fletcher." (Vol. III, Tr. 27-29)

By the testimony of the investigating police officer, the State also presented this fact that they were looking for a person named Fletcher. The testimony was as follows:

"Q: As of March of 1995, was there anyone wanted in connection with the murder of Willie Sorrell?

Mr. Saltiel: Objection.

The Court: Basis?

Mr. Saltiel: Hearsay.

The Court: Response?

Mr. Clarke: May I be heard at sidebar outside the presence of the Jury? It's just the course of this investigation. That's all we're offering it for.

The Court: Overruled. You may answer.

The Witness [The Police Officer] : <u>There were two male Black offenders wanted. One of the witnesses had provided a name of Fletcher</u>.

Mr. Clarke: Was there anyone at the time --

Mr. Hill: Objection, Your Honor.

Mr. Clarke: -- that you were speaking with?

The Court: Basis?

Mr. Hill: Hearsay.

The Court: Response?

Mr. Clarke: Again, I'm just offering for his course of investigation what he did next.

The Court: It will be overruled. The answer will stand.

Mr. Clarke: Q: At the time, was there anyone specific that you wished to speak with?

The Witness: A: From reading the reports, it became obvious to myself and my partner that a subject named Terry Rogers needed to be talked to." (Vol. III, Tr. 179-180) (Emphasis added.)

The court provided no instruction to the jury limiting the jury's use of this testimony.

The officer testified on re-direct examination as follows:

"[The Prosecutor]: Q: On cross examination, you were asked about 2002, and you assembled a photo array; right?

The Witness: A: Yes.

Q: At the time you assembled that photo array, what was the name of that person that you wanted in connection with the murder of Willie Sorrell?

A: James Fletcher." (Vol. III, Tr. 206-207)

Although an objection was sustained, the answer was not stricken and again the court provided no limiting instruction.

In final argument, the prosecutor also argued:

"At that point in 1995, they were looking for someone by the name of James Fletcher." (Vol. V, Tr. 46)

Again, there was no limiting instruction.

Hence, in opening statement, testimony and final argument, the jury was provided with the out-of-court statement of an eye witness who stated the robber was Fletcher. The jury was never advised by instruction or otherwise that this information could not be used as direct evidence of defendant's guilt. These statements are testimonial statements of an

out-of-court accuser. Their admission violates defendant's Sixth Amendment constitutional right. Crawford v. Washington, 541 U.S. 36, 158 L.Ed.2d 177 (2004).

The Appellate Court held there was no error, stating:

> "Next, defendant contends that he was denied his sixth amendment right of confrontation when the trial court allowed a police detective to testify that he found the name 'Fletcher' in the police reports, causing him to look for an individual of that name. Defendant contends that the witness who gave that name to police was never called to testify, thereby preventing defendant from cross-examining him on that identification. Defendant contends the error was compounded when the State referred to the police detective's testimony during opening statement and closing arguments.
>
> Defendant's contention is without merit, as the detective's testimony was admitted only to show the investigative steps taken by him. See People v. Simms, 143 Ill.2d 154, 174 (1991)." (App. 9)

The Appellate Court is in error because the jury was never instructed as to the limited purpose of the admission of such evidence.

And while there was discussion between the prosecutor and defense counsel and the court as to limited purpose of such evidence, these discussions do not alter that there was a denial of defendant's right of confrontation. The discussions referred to by the Appellate Court were not directed to the jury. The jury was not provided any curative instruction.

In regard to testimony "one of the witnesses had provided the name of Fletcher." (Vol. III, Tr. 180), although the prosecutor in response to a defense objection (Vol. III, Tr. 180) stated to the judge, "Again, I'm just offering for his course of investigation what he did next." (Vol. III, Tr. 180), this statement was made to the court, not the jury, and the jury was never given a limiting instruction or other explanation.

The Appellate Court improperly relied on People v. Simms, 143 Ill.2d 154, 572 N.E.2d 947 (1991), a totally distinguishable case.

First, People v. Simms, supra, is distinguishable because there the objected to evidence was admitted at a sentencing hearing. Different rules of evidence apply to sentencing proceedings than to trial proceedings. Trial rules, such as hearsay, are not as rigorously applied to sentencing hearing.

Additionally, in People v. Simms, supra, the reviewing court held there was no prejudice because:

> "The trial court ... instructed the jury that the statement was admitted only to show what caused Officer Gorniak to continue questioning the defendant and that it was not to accept the truth of the matter asserted." (Emphasis added.)

No such limited instruction was given here.

This Court should grant certiorari to reiterate that if out-of-court statements are admitted as an exception to the confrontation rule, there must be a specific limiting instruction.

2.

Defendant was denied his constitutional right of effective assistance of counsel when counsel was ineffective by not requesting an instruction that limited the jury's consideration of hearsay evidence concerning the police looking for a person named Fletcher.

Although trial counsel objected to the admission of this evidence that violated the right of confrontation, counsel never requested at the time the evidence was heard or at the end of the evidence, that the jury be advised as to the limited nature of this evidence.

The failure to have the jury provided with a limited instruction is ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984).

The Appellate Court Order again misstated what the facts were. The Appellate Court stated:

> "In the present case, defendant's contention of ineffective assistance is without merit, as the prosecutor explained in open court and in the hearing of the jury that the testimony was being offered for the limited purpose of showing the course of the police investigation, and the court instructed the jury that evidence admitted for a limited purpose could only be

considered for that purpose." (App. 10)

First, the statement by the prosecutor was to the court, not directed at the jury. There is no showing it was heard by the jury.

Second, the instruction that was provided to the jury did not advise them that the out-of-court identification by the non-testifying witness was evidence not admitted as to defendant being the assailant and only admitted for some other purpose. Hence, defendant was prejudiced by counsel's failure.

This Court should grant certiorari to decide that when evidence of an-out-of-court accuser is admitted to demonstrate the course of investigation, whether counsel must request a limiting instruction to provide effective assistance of counsel.

3.

Where strangers see the assailant for seconds to a few minutes, provide nothing other than a general description and there is no evidence against defendant other than these identifications, an identification made 12 years after the occurrence cannot sustain a conviction and a 12 year delay in making an identification violates due process.

Here, the photo identification was 12 years after the occurrence. The in-court identification was 14 years after the occurrence.

Under the standards set by this Court, the defendant's conviction violates due process.

One of the five factors noted by the United States Supreme Court in Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); and Neil v. Biggers, 409 U.S. 188, 199, 34 L.Ed.2d 401, 411, 93 S.Ct. 375, 382 (1972), for assessing the reliability of identification testimony is the length of time between the crime and the confrontation.

The State Appellate Court did not abide by the standards set by Neil v. Biggers.

The State court relied on People v. Sutherland, 155 Ill.2d 1, 17, 610 N.E.2d 1 (1992) and People v. Slim, 127 Ill.2d 302, 307-08, 537 N.E.2d 317 (1989). While People v. Sutherland, supra, states the

general proposition on appeal, the cases did not deal with eyewitness identification. The conviction was based on scientific identification of physical evidence connecting defendant to the crime. There is no such evidence in this case.

People v. Slim, 127 Ill.2d 302, 537 N.E.2d 317 (1989), although relating to eyewitness identification, is so very different as to be irrelevant. People v. Slim, supra, was a bench trial, not a jury trial. The defendant was accused of stealing a car from its owner. Instead of a twelve year delay in the identification, here, in Slim, defendant was identified only eleven days after the crime while he was riding as a passenger in the owner's car.

Under the controlling constitutional standards, the evidence in relationship to the eye witness identification demonstrates that it violated due process.

Both witnesses had never seen the assailant before the incident, Cooper (Vol. III, Tr, 89) and Miss Friend (Vol. III, Tr. 154). Hence, it is the type of evidence that is weak and leads to misidentification. United States v. Wade, 388 U.S. 218, 18 L.Ed.2d 1149 (1967).

Comparing the facts in this case to the standards set by this Court, it must be concluded that the identification is constitutionally invalid.

(1) The witnesses had never seen the assailant before.

(2) The comparison of the assailant as recalled by the witnesses and defendant was not made until a photo identification 12 years after the occurrence.

(3) The witnesses had no idea something was to happen and it happened suddenly. Cooper saw the assailant briefly as he was fleeing. Cooper had been approached from the back. (Vol. III, Tr. 57)

(4) The witnesses' prior descriptions were most general. Mr. Cooper said the assailant was between 5'6 and 6'. Ms. Friend gave no prior description. Hence, there was no accuracy of the witnesses' prior descriptions.

(5) Mr. Cooper was only seventy-five percent sure and could not be positive. (Vol. III, Tr. 93) The detective who showed him the photo testified:

> "A: He picked out one photo and said it looks like one of the offenders that shot at him and robbed him, but [... he said ...] couldn't be positive." (Vol. III, Tr. 187)

Mr. Cooper testified he told a different private investigator he was only seventy-five percent sure. (Vol. III, Tr. 98-99)

The witnesses did not have a good view of the assailants. Neither witness was able to give anything more than a most general description of the assailant identified as defendant. Hence, it cannot be asserted defendant matched the earlier description of the offender.

Miss Friend similarly did not have a good opportunity to see the assailants. (Vol. III, Tr. 130-175) She provided no prior description.

There was disagreement between Cooper and Miss Friend as to the description of the hair of the offender. Mr. Cooper testified the assailant identified as defendant had a Jheri curl (Vol. III, Tr. 68-69) coming out from under a baseball cap. Miss Friend denied that such person had a Jheri curl. (Vol. III, Tr. 152)

Hence, a review of the testimony of Miss Friend and Mr. Cooper, tested by the important factors set out by this Court, demonstrates the identification lacks the reliability necessary to find defendant guilty beyond a reasonable doubt.

Recent studies have provided good reason for this Court to reevaluate identification and when due process is violated.

It is asserted that a twelve year delay in making an identification of a stranger is too long. This Court should, as in other areas, set a bright

line rule.

The Supreme Court of Wisconsin, after careful study, has found substantial problems with the reliability of commonly used identification procedures. State v. Dubose, 272 Wis.2d 856, 679 N.W.2d 927 (2006).

There, the court asserted:

> "In the decades following Biggers, researchers began studying the psychology behind eyewitness identifications to analyze the effect of the inner-workings of the human mind on eyewitness misidentifications. See, e.g., David B. Fishman & Elizabeth F. Loftus, *Expert Psychology Testimony on Eyewitness Identifications*, 4 Law & Psychol. Rev. 87 (1978); Felice J. Levine & June L. Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 Pa. L. Rev. 1079 (1973). The findings of those studies confirmed common sense: research on perception and memory suggests strongly that any eyewitness report should be evaluated cautiously and skeptically. See Robert Buckhout, *Psychology & Eyewitness Identification*, 2 Law & Psychol. Rev. 75, 75 (1976).
>
> * * *
>
> Psychological research shows that

> contextual conditions are not obvious to a lay cross-examiner, and have a dramatic effect on a witness's ability to identify the perpetrator. These contextual conditions, or complicating factors, include the passage of time before the identification."

Here, the length of time between the offense and the first identification confrontation, a view of photographs, including a photograph of defendant, was more than 12 years.

> "Research shows that a witness's ability to identify a perpetrator correctly decreases rapidly over time. Scientific literature has termed this the forgetting curve. See Loftus & Doyle, *Eyewitness Testimony*, at 49-52 (discussing the classic forgetting curve and memory for faces); Fishman & Loftus, 4 L. & Psychol. Rev. at 90-92 (citing a study using a staged crime to test eyewitness identification after seven weeks). Courts have also acknowledged the forgetting curve. United States v. Downing, 753 F.2d 1224 at 1230 (proffered testimony about the forgetting curve may be admitted); United States v. Moore, 786 F.2d 1308, 1311-12 (5th Cir. 1986) (expert testimony on the effect of the forgetting curve may be admitted)."

The rapid decrease in the ability of a witness to remember details as time passes has sharp

implications for the reliability of eyewitness testimony, especially here, where it was 12 years.

> "Scientific research has shown that highly stressful or violent events increase the likelihood that the witness will misidentify the perpetrator. Loftus & Doyle, *Eyewitness Testimony* at § 2-8. Studies have shown that memory of highly stressful events is less accurate than memory of less stressful events and that high stress specifically reduces the accuracy of identifications. Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004).
>
> In a study of military trainees who were subjected to either highly stressful or non-stressful interrogations, false-positive identifications occurred among the high-stress group more than twice as often as among those subjected to non-stressful interrogations. Charles Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J.L. & Psychiatry 265, 272 tbl.1 (2004). The researchers concluded that contrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 minutes, a large number of subjects in this study were

unable to correctly identify their perpetrator."

This Court should recognize the validity of the scientific studies referred to above and set a bright line rule that a delay of more than 8 years between the occurrence and the identification causes the identification to be unreliable.

There are substantial reasons to doubt the credibility of Cooper and Friend who provided materially conflicting statements.

First, Cooper initially lied to police about his possession and use of a weapon. (Vol. III, Tr. 99) Miss Friend has two felony convictions for possession and/or possession of drugs with intent to deliver. (Vol. III, Tr. 131) She was a reluctant witness who had to be arrested to ensure she complied with the subpoena to come to court. (C. 83, 84, 85, 90, 91)

Additionally, Cooper and Friend's description of their prior relationship and what they were doing together immediately prior to the incident and for how long raises substantial reason to doubt their credibility.

Miss Friend testified she was on the truck (Vol. III, Tr. 135) and then testified she was not on the truck. (Vol. III, Tr. 137) Mr. Cooper contradicted this. (Vol. III, Tr. 57)

Mr. Cooper testified he knew her mother and father. (Vol. III, Tr. 57) In her grand jury statement (Supplemental Record, Tr. 34-35), she stated she knew Mr. Cooper since she was 16 (for about one year) and that she knew him not because Cooper had a relationship with her father, but because she met him when he delivered bread to Jewel Grocery. (Supplemental Record, Tr. 34-35)

Both Mr. Cooper and Miss Friend testified as if they were casual friends. Miss Friend is contradicted by her statement to Officer Jerome Bogucki that she dated Cooper. (Supplemental Record, Tr. 48)

Mr. Cooper and Miss Friend gave different reasons as to why he gave her money. According to Mr. Cooper, "She told me she was at a laundromat. She asked me did I have any change." (Vol. III, Tr. 57) In the police report it states that when she was talking to Cooper "she needed 3 dollars to purchase bleach." (Supplemental Record, Tr. 19) She testified she talked to him "to get some money from him for my daughter." (Vol. III, Tr. 134), and he gave her money to buy shoes for her daughter. (Vol. III, Tr. 134)

These contradictions demonstrate Miss Friend and Mr. Cooper were not truthful about their relationship and what was occurring before the robbery.

Here, under the standards set by this Court, the identification was constitutionally invalid.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

APPENDIX A

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIFTH DIVISION
March 23, 2007

No. 1-05-3447

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 02 CR 16669
JAMES FLETCHER,	)	Honorable John Kirby,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Defendant, James Fletcher, appeals his murder conviction and his sentence of natural life imprisonment. On appeal, defendant contends: (1) identification evidence was insufficient to prove him guilty of murder beyond a reasonable doubt; (2) he was denied his constitutional right to confrontation when an officer testified that after interviewing witnesses, the police began looking for someone named Fletcher; and (3) his trial counsel provided ineffective assistance when he failed to request a limiting instruction regarding hearsay evidence, and failed to impeach a witness who made conflicting statements. We affirm.

Defendant was charged with the murder of Willie Sorrell. At trial, Edward Cooper testified for the State. On December 21, 1990, between 1 p.m. and 1:30 p.m., Cooper drove his Holsum Bread truck to Uncle Remus Restaurant on 5615 West Madison in Chicago, Illinois, in order to make a delivery. As he was returning bread trays to the truck, he encountered Sheenee Friend, whom he knew because he was acquainted with her parents. She asked if he had any change for the laundromat, and he told her to wait until he put the trays into the truck. After opening the door on the truck, a man came from behind and stuck an object into his back. The man then asked Cooper, "You know what this is?" Cooper responded, "[Y]eah." The man ordered Cooper to step into the truck. Two men followed Cooper into the truck, both carrying revolvers. One of the men pointed his gun at

Cooper and demanded money. Cooper reached into his left pocket, pulled out some money, and gave it to him. The other gunman then reached into Cooper's right pocket and took the rest of the money. Cooper identified defendant as the gunman who took money from his right pocket.

Both gunmen then focused on the safe in the truck and told Cooper to open it for them. Cooper replied that he did not have the key to the safe, but that they could simply take the truck. Defendant told the other man to shoot Cooper. Both gunmen stepped out of the truck and ran west on Madison. One of them turned around. Cooper reached for his gun which he kept for protection. Both gunmen and Cooper began shooting at each other, and Cooper chased them until the gunmen ran into an abandoned building. Cooper did not enter the building. Another person named Terry Rogers also pursued the offenders.

As he was returning to the truck, Cooper stopped at a store on Wallace and Madison Streets, and left his gun with someone there. When he got to his truck, Cooper noticed a man lying on the ground and police officers nearby. An officer took Cooper back to the abandoned building, but the gunmen were no longer inside. At trial, Cooper described defendant at the time of the offense as having collar length Jheri curls, wearing a baseball cap, Starter jacket and dark pants, standing between 5-feet-8-inches and 6-feet-tall, and

weighing between 160 to 170 pounds. The other gunman was about 5-feet-8-inches to 5- feet-10-inches-tall, weighing between 150 to 160 pounds, also wearing a Starter jacket and baseball cap. Both men were in their late 20's to early 30's.

Police interviewed Cooper about the shooting again in 2002. They showed him an array of seven photographs from which Cooper identified a photograph of defendant as one of the gunmen. In April, 2002, Cooper went to the police station to view a line-up in which he again identified defendant as one of the gunmen. On cross-examination, Cooper acknowledged that he told another investigator in 2004 that he was "only about 75 percent sure" of the identity of the suspects. However, on re-direct examination, Cooper stated that he told police officers at the time he viewed the lineup that he was positive that defendant was one of the gunmen, and he never told police he was uncertain.

Emmett Wade testified that on December 21, 1990, at approximately 1:20 p.m., he was sitting in his van on Madison and Central, waiting for family members. He was reading the newspaper when someone screamed. He looked up and saw the driver of a Holsum Bread truck running towards him with a gun. He fired a shot that struck and ricocheted off the windshield of Wade's van. Wade saw people wearing hoodies running west, and he got out of his van. More gunshots were coming from

behind, to the west. Wade saw a man coming out of a nearby liquor store, fall to the ground, struck by some of the gunfire. Wade testified that the man was not shot by the bread truck driver, but by one of the other shooters.

Sheenee Friend testified that on December 21, 1990, at approximately 1:30 p.m., she was at the laundromat across the street from the Uncle Remus Restaurant. When she saw Cooper, a friend of her father's, making a delivery to the restaurant, she approached him and asked for some money for her daughter. As she spoke with Cooper in the bread truck, she noticed two unfamiliar men standing nearby. After receiving money from Cooper, Friend stepped off the truck and one of the men grabbed her arm and cursed. She pulled away and the two men went into the truck. Friend identified defendant as the man who grabbed her arm. Friend watched the men through the truck windows, and saw defendant search Cooper while the other held a gun against him. The men then jumped out of the truck and Cooper followed, chasing them. Cooper pulled out a gun as the men were running and when he shot at them, they fired back. An old man coming out of the liquor store was struck by some of the shots fired by the robbers. Friend then walked back to the laundromat. Friend described defendant at the time of the offense as wearing a skullcap, although she did not see his hair.

Friend went to the police station in April, 2002,

to view a photo array. From the photographs, Friend identified defendant as one of the gunmen. Two months later, Friend identified defendant in a line-up.

Detective Jerome Bogucki testified that in March 1995, he was assigned to investigate the murder of Willie Sorrell that had occurred on December 21, 1990, just west of Central and Madison. Reports indicated that police were searching for two male, black offenders, and that one of the witnesses gave the name "Fletcher." Also, a witness named Terry Rogers needed to be interviewed. On February 12, 2002, he and his partner were finally able to meet with Rogers. They later interviewed Cooper and Friend. Friend identified a photograph of defendant. Detectives obtained an arrest warrant for defendant on March 21, 2002, and defendant was arrested April 19, 2002. On April 20, 2002, Friend and Cooper separately identified defendant in a line-up.

The jury found defendant guilty of murder and the trial court sentenced defendant to a term of natural life in the Department of Corrections. Defendant filed this timely appeal.

First, defendant contends that the State failed to prove him guilty beyond a reasonable doubt. Particularly, defendant argues that Cooper's and Friend's identifications of him are suspect because of: (1) the length of time (12 years) between the

offense and the identification; (2) their limited opportunity to view the offender; and (3) their general and non-exact descriptions of the offender. Defendant also contends that their degree of attention at the time of the offense was not good, and that Cooper expressed a lack of certainty when identifying defendant in the photo array.

In reviewing a challenge to the sufficiency of the evidence, the question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Sutherland, 155 Ill. 2d 1, 17 (1992). Relevant factors to consider when evaluating the reliability of a witness' identification are: (1) the opportunity to view the perpetrator at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the perpetrator; (4) the level of certainty at the identification; and (5) the length of time between the offense and the identification. People v. Slim, 127 Ill. 2d 302, 307-08 (1989). When the issue involves the credibility of witnesses, or the weight given to their testimony, a reviewing court will not substitute its judgment for that of the fact finder. People v. Sutherland, 155 Ill. 2d at 17.

In the present case, both Cooper and Friend testified to similar accounts of the shooting. Cooper testified that he was approached by two armed men

who took money from his pocket. Friend testified that Cooper was approached by two men, one of whom held a gun on Cooper, while the other one searched his pockets. While the armed men were fleeing, they engaged in gunfire with Cooper, during which the victim was shot and killed. Cooper and Friend each testified that defendant was one of the gunmen. On appeal, defendant contends that Cooper never got a good view of the offender, because the offender approached him from behind. However, Cooper testified that he saw defendant back off the truck (i.e., defendant was facing Cooper), and he further testified that defendant was looking at him at the time shots were fired. Friend testified that she saw defendant through the windows of Cooper's truck and that she had a clear view. In 2002, twelve years after the shooting, Friend and Cooper separately identified defendant in a photo array and lineup. Two years later, in 2004, Cooper indicated that he was only 75% certain of the identity of the suspects. Friend never expressed any similar uncertainty, and testified at trial that she had "[n]o doubt at all" as to the identity of the defendant.

Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found defendant guilty of murder beyond a reasonable doubt.

Next, defendant contends that he was denied his sixth amendment right of confrontation when

the trial court allowed a police detective to testify that he found the name "Fletcher" in the police reports, causing him to look for an individual of that name. Defendant contends that the witness who gave that name to police was never called to testify, thereby preventing defendant from cross-examining him on that identification. Defendant contends the error was compounded when the State referred to the police detective's testimony during opening statement and closing arguments.

Defendant's contention is without merit, as the detective's testimony was admitted only to show the investigative steps taken by him. See People v. Simms, 143 Ill. 2d 154, 174 (1991).

Next, defendant contends that his trial counsel was ineffective for failing to request a limiting instruction informing the jury that the detective's testimony can only be considered to show the investigative steps taken by him, and not as evidence of defendant's guilt.

To prevail on his claim of ineffective assistance, defendant must satisfy the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Under Strickland, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that this substandard performance prejudiced the defendant by creating a reasonable probability that, but for counsel's errors,

the result of the trial would have been different. Strickland, 466 U.S. at 687-88, 80 L. Ed. 2d at 693-94, 104 S. Ct. at 2064-65; People v. Enis, 194 Ill. 2d 361, 376 (2000). A reasonable probability is a probability sufficient to undermine the confidence in the result of the trial, namely, that counsel's deficient performance rendered the outcome unreliable or the proceeding fundamentally unfair. Enis, 194 Ill. 2d at 376. The failure to satisfy either the deficiency prong or the prejudice prong of the Strickland test precludes a finding of ineffective assistance. Enis, 194 Ill. 2d at 377.

In the present case, defendant's contention of ineffective assistance is without merit, as the prosecutor explained in open court and in the hearing of the jury that the testimony was being offered for the limited purpose of showing the course of the police investigation, and the court instructed the jury that evidence admitted for a limited purpose could only be considered for that purpose. Further, any error was not prejudicial, as there is no reasonable probability that the result of the trial would have been different.

Next, defendant contends that his counsel provided ineffective assistance for failing to present evidence that the identification witnesses, Ms. Friend and Mr. Cooper, were dating. Defendant also contends his counsel was ineffective for failing to question Ms. Friend about conflicting statements she made regarding why she had asked to borrow

money from Mr. Cooper. Specifically, a police report indicated that Ms. Friend asked to borrow three dollars from Mr. Cooper because she needed bleach, whereas in her trial testimony she stated that she needed the money for her daughter.

Defendant has failed to show any reasonable probability that the result of the trial would have been different but for counsel's alleged errors. Accordingly, his contention of ineffective assistance is without merit.

For the foregoing reasons, we affirm the circuit court.

Affirmed.

O'BRIEN, P.J., with TULLY, J., and GALLAGHER., J., concurring.

APPENDIX B

No. 104798

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

September 26, 2007

Mr. Frederick F. Cohn
Attorney at Law
35 East Wacker Drive
Suite 1525
Chicago, IL 60601

No. 104798 - People State of Illinois, respondent, v. James Fletcher, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on November 1, 2007.